Supreme Court, U.S.
FILED
NOV 27
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(13)

No. 97-1868

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNUM LIFE INSURANCE COMPANY OF AMERICA,
PETITIONER

v.

JOHN E. WARD

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER IN PART AND SUPPORTING RESPONDENT IN PART

SETH P. WAXMAN
Solicitor General
Counsel of Record

EDWIN S. KNEEDLER
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JUDITH E. KRAMER
Deputy Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Deputy Associate Solicitor

ELIZABETH HOPKINS
Attorney
Department of Labor
Washington, D.C. 20210

36pp

QUESTIONS PRESENTED

1. Whether the "notice-prejudice" rule under California law, which prevents an insurance company from avoiding liability on the basis of an untimely notice or submission of proof unless the insurer has been substantially prejudiced by the delay, is a state law that "regulates insurance" and is thereby saved from preemption by Section 514(b)(2)(A) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144(b)(2)(A) in this case.

2. Whether a state common law rule of agency law, known as the *Elfstrom* rule, under which an employer may, in some circumstances, be deemed to be the agent of the insurance company, "relate[s] to" an ERISA plan within the meaning of ERISA's preemption provision, 29 U.S.C. 1144(a), when applied in an action by a plan participant to recover benefits under ERISA Section 502, 29 U.S.C. 1132.

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INTEREST OF THE UNITED STATES

This case presents questions concerning the scope of the preemption provision of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144(a), as well as the scope of the provision that saves state insurance regulation from ERISA preemption, 29 U.S.C. 1144(b)(2)(A). Because the Secretary of Labor has primary authority for enforcing and administering Title I of ERISA, see 29 U.S.C. 1002(13), 1136(b), the United States has a substantial interest in ensuring that ERISA preemption principles are appropriately applied.

STATEMENT

1. Respondent John E. Ward was president and chief executive officer of Management Analysis Company (MAC) until he resigned in May of 1992. Pet. App. 3a, 27a. During his nine years of employment with MAC, respondent had premiums deducted from his paycheck for long-term disability insurance under a group policy issued by petitioner

UNUM Life Insurance Co. of America to MAC. *Id.* at 28a. This disability policy provides the benefits under MAC's employee welfare plan, which is governed by ERISA. *Id.* at 2a.

In December 1992, respondent was diagnosed as suffering from diabetic neuropathy, which had for some time been causing him severe and disabling leg pain. Pet. App. 3a, 28a. In 1993, he applied for and received an award of state disability benefits, and shortly thereafter, a determination of eligibility for Social Security disability benefits. *Ibid.* Respondent forwarded a copy of that determination to MAC's human resources department to arrange for continuation of his health insurance coverage, but was not notified that he might obtain coverage under the long-term disability plan. *Ibid.*

In April 1994, while cleaning out a safety deposit box, he came across a booklet summarizing the disability plan, at which time he again contacted MAC's human resources department to inquire whether he might be covered. Pet. App. 3a, 28a. He was informed by the company that he was covered and was given an application for long-term disability benefits, which he completed and returned to MAC. MAC completed the employer's portion of the application and forwarded it to petitioner on April 11, 1994. *Id.* at 3a, 28a-29a. Two days later, petitioner denied respondent's claim for benefits as untimely under the terms of the policy, which specifies that written proof of claim be given to petitioner not later than one year and 180 days after the onset of disability. *Id.* at 3a, 4a-5a, 29a, 32a. On July 12, 1994, petitioner affirmed its denial, after respondent requested review of his claim. *Id.* at 3a; see *id.* at 29a (different date).

2. Respondent filed suit against the MAC plan and petitioner under Section 502 of ERISA, 29 U.S.C. 1132, to recover benefits. Pet. App. 77a. Respondent argued that the claim was timely under the *Elfstrom* rule, see *Elfstrom* v. *New York Life Ins. Co.*, 432 P.2d 731 (Cal. 1967), a pre-ERISA state agency principle providing that where an

employer administers an insured group health plan, it acts as the agent of the insurance company. In respondent's view, MAC acted as petitioner's agent for purposes of the disability insurance policy, and the notice respondent gave MAC therefore constituted timely notice of claim to petitioner. The district court rejected that argument on the ground that the *Elfstrom* rule is preempted by ERISA and is not saved as a law that "regulates insurance" under ERISA's insurance savings clause, 29 U.S.C. 1144(b)(2)(A). The court reasoned that the *Elfstrom* rule is not a saved insurance regulation for two reasons: it does not transfer risk, and it is not an integral part of the policy relationship between the insurer and the insured, since California law specifically allows insurance contracts to define the extent of the employer's agency relationship with the insurance company. Pet. App. 30a-31a. The district court therefore granted summary judgment for petitioner, agreeing that the claim for benefits was untimely under the terms of the plan. *Id.* at 32a-33a.

3. The Ninth Circuit reversed, on two grounds. First, although the court agreed that the notice and proof of claim were clearly untimely under the express terms of the plan, Pet. App. 4a-5a, the court nevertheless held that the case should be remanded for further consideration of whether, under California's "notice-prejudice" rule, petitioner suffered actual prejudice from the untimely notice. *Id.* at 6a. The notice-prejudice rule provides that an insurer may not deny a claim as untimely unless it can show actual prejudice resulting from the delay. *Id.* at 5a-6a. In holding that ERISA does not preempt the notice-prejudice rule, the court relied on its recent decision in *Cisneros* v. *UNUM Life Insurance Co. of America*, 134 F.3d 939, 945-947 (9th Cir. 1998), petition for cert. pending, No. 97-1867.

Cisneros held that the California notice-prejudice rule is saved from ERISA preemption as a law "which regulates insurance." 29 U.S.C. 1144(b)(2)(A). Noting that the rule

dictates the terms of the insurance relationship and is specifically and exclusively applicable to insurance contracts, the court concluded in *Cisneros* that the rule is saved because it fits a common-sense understanding of insurance regulation. 134 F.3d at 945, citing *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724, 740-742 (1985). As this Court had done in *Metropolitan Life*, the *Cisneros* court also looked to the three factors that are used in determining whether a particular state law relates to the "business of insurance" under the McCarran-Ferguson Act, 15 U.S.C. 1012.[1] The *Cisneros* court concluded that the notice-prejudice rule does not satisfy the first factor because it does not transfer or spread policyholder risk as required by that factor. But, the court held, that "imperfection" is not "dispositive," *Cisneros*, 134 F.3d at 945, because the McCarran-Ferguson criteria are simply factors to be weighed in determining whether a law "regulates insurance," *id.* at 946. Because the notice-prejudice rule creates a mandatory contract term and is applicable only to the insurance industry, the court determined that it clearly meets the other two McCarran-Ferguson factors, and that on balance it "regulates insurance" under Section 514(b)(2)(A) of ERISA. *Id.* at 945-947.

Second, in addition to remanding in light of *Cisneros*, the Ninth Circuit also held that the rule of state agency law announced in *Elfstrom*—that "the employer is the agent of the insurer in performing the duties of administering group

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[1] The three factors are:

> *[F]irst*, whether the practice has the effect of transferring or spreading the policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.

Pilot Life v. *Dedeaux*, 481 U.S. 41, 48-49 (1987) (quoting *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 129 (1982)).

insurance policies," 432 P.2d at 737; see Pet. App. 9a—is not preempted by ERISA Section 514(a), 29 U.S.C. 1144(a). Pet. App. 22a. The court concluded that the *Elfstrom* rule does not "relate to" employee benefit plans within the meaning of Section 514(a) because it does not govern the structure or administration of employee benefit plans or "create an 'alternative enforcement mechanism.'" *Id.* at 21a-22a (citation omitted). Moreover, reasoning that "[n]othing in [Section] 514(a) empowers a plan fiduciary to extend ERISA's preemptive reach by using policy language that negates agency law principles," the court declined to attach significance to the fact that the policy expressly provided that the employer should not be deemed to be the insurer's agent. *Id.* at 22a-23a. The court left to the district court on remand the question whether MAC in fact acted as an agent in administering petitioner's plan, particularly with respect to the receipt and forwarding of benefit claims. *Id.* at 24a-25a.

SUMMARY OF ARGUMENT

I. The notice-prejudice rule under California law provides that an insurer may not deny benefits by reason of an untimely claim, unless the insurer proves that it has suffered prejudice as a result of the untimeliness. Although that rule "relates to" ERISA plans when it is applied to a claim for benefits under an ERISA plan and therefore falls within the scope of ERISA's basic preemption provision, 29 U.S.C. 514(a), it is not preempted, because it falls within the provision of ERISA that saves from preemption state laws that "regulate[] insurance," 29 U.S.C. 1144(b)(2)(A). This Court has employed a two stage-process for determining whether state laws "regulate[] insurance" under the savings clause. The notice-prejudice rule satisfies the first, "common sense" component, because, as the court of appeals found, the rule is not a generally applicable rule of contract law in California, but is instead specifically directed toward the insurance industry. It also generally satisfies the factors used to deter-

mine the application of the McCarran-Ferguson Act, which constitutes the second component of the ERISA insurance savings clause analysis.

The court of appeals held that the notice-prejudice rule does not satisfy the McCarran-Ferguson "risk spreading" factor, but that, taking the analysis as a whole, it nonetheless qualifies as a law that "regulates insurance" within the meaning of the ERISA savings provision. Although it may be argued that the notice-prejudice rule does spread certain risks, the court of appeals' conclusion that the rule "regulates insurance" is correct in any event.

Petitioner argues that all three McCarran-Ferguson factors must be satisfied in order for a law to be found to "regulate[] insurance." This Court has repeatedly referred to the McCarran-Ferguson factors, however, as "guides" or items "relevant" to the analysis; it has stated that no single factor is determinative; and it has actually applied the factors flexibly. Textual differences between the McCarran-Ferguson Act and the ERISA insurance savings clause, as well as a consideration of the differing legal contexts in which the two Acts operate, establish that, even if the McCarran-Ferguson factors would be applied more rigidly in a case arising under that statute, they should be construed flexibly in the ERISA context.

Petitioner has argued that the court of appeals erred because the notice-prejudice rule creates a new cause of action based on a late-filed claim for benefits, and that it therefore conflicts with ERISA's civil enforcement scheme. That argument is mistaken; respondent has simply brought an action under Section 502(a)(1)(B) of ERISA itself for benefits due, and state insurance law provides a relevant rule of decision in that action. Petitioner's contention may be rejected on that ground alone, without addressing any broader rationale regarding the preemptive effect of Section 502 on causes of action brought directly under a state law that regulates insurance. Consideration of that broader

rationale would present the Court with the question whether it should reconsider part of the rationale of its decision in *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41 (1987), regarding the interaction between Congress's intent to make Section 502 the exclusive remedy for claims under ERISA and its simultaneous intent to save state laws that "regulate[] insurance."

II. The court of appeals erred in holding that the state-law *Elfstrom* rule, under which an employer who carries out agency-like duties under an insurance policy will be treated like an agent of the insurance company, may be applied in this case. When applied to an ERISA plan, the *Elfstrom* rule requires the employer to take on additional legal duties that vary from State to State, thereby regulating the basic services that a plan may provide to its participants and beneficiaries. It therefore "relates to" ERISA plans. The *Elfstrom* rule is not saved by the insurance savings provision, because it appears merely to be an application of quite general principles of agency law in the insurance context. A federal court in a case like this could, however, apply similar agency principles as a matter of federal common law under ERISA.

ARGUMENT

CALIFORNIA'S NOTICE-PREJUDICE RULE IS A LAW THAT "REGULATES INSURANCE" AND IS THEREFORE SAVED FROM PREEMPTION BY 29 U.S.C. 1144(B)(2)(A)

A. The Notice-Prejudice Rule "Relates To" ERISA Plans

1. Under Section 514(a) of ERISA, 29 U.S.C. 1144(a), the provisions of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." The California notice-prejudice rule does "relate to" ERISA plans. As stated by the court of appeals, the rule provides that "the insurer * * * may not deny benefits by reason of untimely notice or submission of proof

of claim unless the insurer proves that it has suffered actual prejudice because of the delay." Pet. App. 5a-6a. That rule is equivalent to requiring each insurance policy—including those issued to ERISA plans, see 29 U.S.C. 1002(1) (defining "employee welfare benefit plan" under ERISA to apply to plans providing benefit "through the purchase of insurance or otherwise")—to contain a term prohibiting a denial of benefits on untimeliness grounds where prejudice cannot be shown.

In *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724 (1985), this Court addressed an analogous issue regarding the preemption under ERISA of a state law mandating that certain mental health benefits be provided to any state resident who is insured under certain types of policies. The Court held that a mandated benefits law of that kind "relates to" ERISA plans insofar as it is sought to be applied to such plans. 471 U.S. at 739. Neither the fact that the state law was consistent with any substantive provision of the plan, nor the fact that the state law applied widely to individuals and entities other than ERISA plans, was sufficient to remove it from the preemptive force of ERISA's "relates to" language. Accord *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 663-664 (1995) ("Because the regulated policies [in *Metropolitan Life*] included those bought by employee welfare benefit plans, we recognized that the law 'directly affected' such plans."); *Shaw* v. *Delta Airlines, Inc.*, 463 U.S. 85, 97 (1983) (state disability law "which requires employers to pay employees specific benefits, clearly 'relate[s] to' benefit plans").

The same principle applies here. Although the notice-prejudice rule does not mandate that insurance policies issued to ERISA plans include any particular substantive benefit, its effect is similar to that of the laws at issue in *Metropolitan Life* and *Shaw*, because it in effect requires plans to include particular provisions (in this case, regarding

the enforcement of claim filing deadlines) in their insurance contracts. Indeed, the argument that the state law "relates to" ERISA plans is stronger in this case than in *Metropolitan Life* and *Shaw*, since—unlike the substantive benefits that an insured ERISA plan must offer, as to which ERISA itself is silent—the statute itself contains some provisions regarding claims processing.[2] Accordingly, like the rules at issue in *Metropolitan Life* and *Shaw*, the notice-prejudice rule "mandate[s] employee benefit structures or their administration" when applied to ERISA plans. *New York State Conference of Blue Cross & Blue Shield Plans*, 514 U.S. at 658. It therefore "relates to" such plans.

B. The Notice-Prejudice Rule Is Saved From Preemption By ERISA's Insurance Savings Clause

Under the insurance savings clause of ERISA, Section 514(b)(2)(A), 29 U.S.C. 1144(b)(2)(A), the general "relates to" criterion for preemption is significantly qualified. The insurance savings clause provides that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance." 29 U.S.C. 1144(b)(2)(A). By saving such insurance regulation from preemption, ERISA "leaves room for complementary or dual federal and state regulation" of the insurance industry. *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 98 (1993). The ultimate question in determining whether a state law is saved from preemption under the insurance savings clause is whether the law "regulates insurance."

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[2] The Department of Labor has issued regulations regarding claims procedures, but they do not address the timing of notice of claims. See 29 C.F.R. Pt. 2560. See also 63 Fed. Reg. 48,390-48,409 (1998) (proposing new, minimum claims-procedure regulations, which, among other things, set shorter time limits for the resolution of claims and establish more extensive disclosure and review requirements).

This Court has employed a two-stage analysis for deciding whether a state law "regulates insurance" in this context. First, the Court undertakes a "common-sense" examination of the state law at issue. *Metropolitan Life*, 471 U.S. at 740. "A common-sense view of the word 'regulates' would lead to the conclusion that in order to regulate insurance, a law must not just have an impact on the insurance industry, but must be specifically directed toward that industry." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 50 (1987). Second, because a purpose of the insurance savings clause was "to preserve the McCarran-Ferguson Act's reservation of the business of insurance to the States," *Metropolitan Life*, 471 U.S. at 744 n.21, the three factors used to determine whether a state law regulates the "business of insurance" within the meaning of the McCarran-Ferguson Act are also relevant to the ERISA determination. See note 1, *supra*.[3]

Under this two-tiered analysis, a state law that mandates benefits to be provided in insurance purchased by an ERISA plan falls within the savings provision and is not preempted. *Metropolitan Life*, 471 U.S. at 746. On the other hand, general state tort or contract law that applies to the insurance industry, but is not specifically directed toward that industry, is not a law regulating insurance that falls within the savings provision and, to the extent it "relate[s] to" a plan, is preempted. *Pilot Life*, 481 U.S. at 50, 57.

1. *The court of appeals correctly held that the notice-prejudice rule, as a matter of "common sense," is directed toward the insurance industry.* The court of appeals in this

[3] A state law that purports to regulate insurance by "deem[ing]" a plan to be an insurance company is outside the savings provision and subject to preemption. 29 U.S.C. 1144(b)(2)(B). As a result of that provision, self-insured plans are generally outside the scope of state insurance regulation. See, *e.g.*, *Metropolitan Life*, 471 U.S. at 747. Because this case does not involve a self-insured plan or an attempt to deem a plan to be an insurance company, this "deemer" clause is not at issue in this case.

case relied on its recent decision in *Cisneros* v. *UNUM Life Insurance Co. of America*, 134 F.3d 939 (9th Cir. 1998), petition for cert. pending, No. 97-1867, to hold that the notice-prejudice rule is saved from preemption by virtue of the ERISA insurance savings provision. In *Cisneros*, the court reasoned that the notice-prejudice rule, "by requiring the insurer to prove prejudice before enforcing proof-of-claim requirements, * * * dictates the terms of the relationship between the insurer and insured and so seems, as a matter of common sense, to 'regulate insurance.'" *Id.* at 945. The court also noted that "[t]he rule is directed specifically at the insurance industry and is applicable only to insurance contracts." *Ibid.* The Ninth Circuit's conclusion in *Cisneros* that the notice-prejudice rule satisfies an ordinary understanding of insurance regulation is correct.[4]

Petitioner belatedly argued in its reply brief at the certiorari stage of this case that the notice-prejudice rule "is nothing more than a basic principle of contract law which applies to *all* contracts, not merely insurance policies." Pet. Reply Br. 5. Assuming that that issue is "fairly included" in the questions presented in the petition, see Sup. Ct. R. 14.1(a), and is therefore properly before the Court, petitioner's new argument should be rejected. Determining whether California's notice-prejudice rule is directed at the insurance industry narrowly, or is instead a "basic principle of contract law" recognized throughout the State's law,

[4] The notice-prejudice rule is not unique to California insurance regulation. As one influential treatise has noted, "there is something approaching a consensus in regard to the general proposition that an insured's coverage should only be lost when the insurer has been prejudiced." Robert E. Keeton & Alan I. Widiss, *Insurance Law: A Guide To Fundamental Principles, Legal Doctrines, and Commercial Practices* § 7.2, at 763 (1988). Indeed, if the rule were not saved by the insurance savings clause, the question would arise as to whether the rule should be adopted as a matter of federal common law under ERISA itself. See, *e.g.*, *Pilot Life*, 481 U.S. at 56.

requires an analysis of the law of California. Petitioner offers no reason to disturb the conclusion of the court of appeals, which is presumed to be familiar with the law of the States in its circuit, that the notice-prejudice rule under California law is directed specifically at the insurance industry. See *Sheridan* v. *United States*, 487 U.S. 392, 401-402 (1988); *Runyon* v. *McCrary*, 427 U.S. 160, 181 (1976); *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944).

In any event, our survey of California law reveals no cases where the state courts apply the notice-prejudice rule as such outside the insurance area. Nor is this surprising, given that the rule is stated in terms of prejudice to an "insurer" resulting from untimeliness of notice. See *Shell Oil Co.* v. *Winterthur Swiss Ins. Co.*, 12 Cal. App. 4th 715, 760 (Ct. App. 1993) ("California law is settled that a defense based on an insured's failure to give timely notice requires the insurer to prove that it suffered substantial prejudice."). Thus, even if petitioner were correct in viewing the notice-prejudice rule (perhaps like much insurance regulation) as having its roots in established common law contract doctrine, or more broadly as being a species of harmless error doctrine, we agree with the Ninth and District of Columbia Circuits that, as it now exists, the rule of notice-prejudice "applies only to insurers." *O'Connor* v. *UNUM Life Ins. Co. of Am.*, 146 F.3d 959, 964 (D.C. Cir. 1998); compare *Security Life Ins. Co. of Am.* v. *Meyling*, 146 F.3d 1184, 1189 (9th Cir. 1998) (California insurance code provision allowing rescission in the event of material misrepresentation merely codifies the common law remedy of rescission and is not a regulation of insurance).[5]

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[5] We note that state common law created by the decisions of state courts, such as the notice-prejudice rule, fits ERISA's literal definition of state law. 29 U.S.C. 1144(c)(1) ("[t]he term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law").

2. *The McCarran-Ferguson Act factors also suggest that the California notice-prejudice rule is a law that "regulates insurance" under the ERISA savings clause.* In its prior decision in *Cisneros*, upon which the court relied in this case, the court of appeals considered the application of the McCarran-Ferguson Act factors to the California notice-prejudice rule. The court held that the notice-prejudice rule clearly satisfies two of the factors, concluding that the rule is "an integral part of the policy relationship between the insurer and the insured" and that it "is limited to entities within the insurance industry." See *Cisneros*, 134 F.3d at 946. Those conclusions are correct. By "effectively creat-[ing] a mandatory contract term" that requires the insurer to prove prejudice before enforcing a timeliness-of-claim provision, the notice-prejudice rule "dictates the terms of the relationship between the insurer and the insured, and consequently, is integral to that relationship." *Ibid.* In addition, as discussed above, the notice-prejudice rule appears to be specifically tailored to the insurance industry and applies only in that context. The primary dispute in this case, then, concerns the remaining McCarran-Ferguson factor—whether the notice-prejudice rule "has the effect of transferring or spreading a policyholder's risk." *Metropolitan Life*, 471 U.S. at 743.

a. The *Cisneros* court held that the notice-prejudice rule does not satisfy the McCarran-Ferguson "risk spreading" criterion. The court held that that criterion "refers to the risk of injury for which the insurance company contractually agreed to compensate the insured." 134 F.3d at 945-946. The court stated that, although "[t]he notice-prejudice rule does shift the risk of lost coverage as a result of late submission of proof," it "does not alter the allocation of risk for which the parties initially contracted, namely the risk of lost income from long-term disability." *Id.* at 946.

In our view, although the distinction the court of appeals attempted to draw between different types of risk spreading

finds substantial support in the case law,[6] it is ultimately unsatisfactory. Insofar as the notice-prejudice rule shifts the risk of late notice and stale evidence from the insured to the insurance company in some instances, it has the effect of raising premiums and spreading risk among policyholders. See *United States Dep't of Treasury* v. *Fabe*, 508 U.S. 491, 503-504 (1993) (in holding that the actual performance of a contract constitutes the "business of insurance" within the meaning of the McCarran-Ferguson Act, the Court notes that "[w]ithout performance of the terms of the insurance policy, there is no risk transfer at all."). Therefore, the notice-prejudice rule could, in our view, be found to satisfy the McCarran-Ferguson "risk spreading" factor.[7]

b. The Court need not, however, determine the soundness of the court of appeals' conclusion that the notice-prejudice rule does not spread risk under the McCarran-

[6] See *Davies* v. *Centennial Life Ins. Co.*, 128 F.3d 934, 941 (6th Cir. 1997); *Tingle* v. *Pacific Mut. Ins. Co.*, 996 F.2d 105, 108 (5th Cir. 1993); *DeBruyne* v. *Equitable Life Assurance Soc'y of the United States*, 920 F.2d 457, 469 (7th Cir. 1990); *Smith* v. *Jefferson Pilot Life Ins. Co.*, 14 F.3d 562, 569 n.9 (11th Cir.), cert. denied, 513 U.S. 808 (1994); cf. *O'Connor*, 146 F.3d at 962 note (noting that because policyholder conceded the point, it had no occasion to decide whether the notice-prejudice rule transfers or spreads policyholder risk).

[7] Although the court of appeals attempted to rely on this Court's decision in *Metropolitan Life* to support its distinction between "the risk for which the parties originally contracted" and the risk of late notice and stale evidence addressed by the notice-prejudice rule, 134 F.3d at 946, that reliance was misplaced. The Court in *Metropolitan Life* held that a state law mandating the inclusion of certain mental health benefits in certain types of insurance policies tended to spread risks under the McCarran-Ferguson Act test. Just as in this case, however, the risk that was spread by the state rule—the risk of mental illness—was not a risk "for which the parties initially contracted," in the Ninth Circuit's phrase; the parties in *Metropolitan Life* specifically contracted only to spread other kinds of health risk. Nonetheless, the state law at issue required the parties to spread an additional risk, and it was therefore found to satisfy the McCarran-Ferguson "risk spreading" criterion.

Ferguson factors. Even if the notice-prejudice rule does not spread the kind of risk addressed by the McCarran-Ferguson factors, the fact that it does not is not fatal to the contention that the rule "regulates insurance" within the meaning of the ERISA savings clause. That is because, as the Ninth Circuit correctly held, "the McCarran-Ferguson factors are simply relevant considerations or guideposts, not separate essential elements of a three-part test that must each be satisfied for a law to escape preemption." *Cisneros*, 134 F.3d at 946.[8]

Initially, this Court itself has made it clear that the McCarran-Ferguson criteria were not intended to introduce a rigid three-part test under that Act. Although the Court stated in *Group Life & Health Insurance Co.* v. *Royal Drug*

[8] The Ninth Circuit's view is in line with that of the District of Columbia and Sixth Circuits, *O'Connor*, 146 F.3d at 963; *Davies*, 128 F.3d at 940; cf. *Soniat* v. *Travelers Ins. Co.*, 538 So. 2d 210, 214-215 (La. 1989) (holding policy-cancellation provision saved under common-sense approach without resort to *Pireno* factors), while the Fifth Circuit is the only circuit to have directly held that all three factors are essential. *CIGNA Healthplan of La., Inc.* v. *Louisiana ex rel. Ieyoub*, 82 F.3d 642, 650 (5th Cir.) ("[I]f a statute fails * * * to satisfy any one element of the three-factor *Metropolitan Life* test, then the statute is not exempt from preemption by the ERISA insurance savings clause."), cert. denied, 519 U.S. 964 (1996); accord *Tingle*, 996 F.2d at 108 (holding statute preempted that "fails to satisfy at least one prong of the three part *Metropolitan Life* test"). Other courts have reached varying results that appear to depend on a more flexible analysis, not a rigid rule requiring state laws to satisfy each of the McCarran-Ferguson criteria to come within the ERISA insurance savings clause. See, *e.g.*, *Brewer* v. *Lincoln Nat'l Life Ins. Co.*, 921 F.2d 150, 153 (8th Cir. 1990) (common law rule not saved because it failed two factors), cert. denied, 501 U.S. 1238 (1991); *Howard* v. *Gleason Corp.*, 901 F.2d 1154, 1158-1159 (2d Cir. 1990) (statutory provision not saved because it failed to meet common sense test and two factors); *Kelley* v. *Sears, Roebuck & Co.*, 882 F.2d 453, 456 (10th Cir. 1989) (statute not saved because it failed to meet two of three factors); *Anschultz* v. *Connecticut Gen. Life Ins. Co.*, 850 F.2d 1467, 1469 (11th Cir. 1988) (state law that failed to meet two of McCarran-Ferguson factors is not saved).

Co., 440 U.S. 205, 211-212 (1979), that risk-spreading is an "indispensable characteristic of insurance," it does not follow that regulation of the business of insurance always directly involves the regulation of risk-spreading, either under the McCarran-Ferguson Act itself or under ERISA. Indeed, since its initial articulation of the three criteria in *Royal Drug*, the Court has been consistent in disavowing any attempt to use them as a rigid three-part test. That has been true both in cases directly applying the McCarran-Ferguson Act, such as *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 129 (1982) ("None of these criteria is necessarily determinative in itself."), and in cases applying the ERISA insurance savings clause, such as *Pilot Life*, 481 U.S. at 48, 49 (referring to the factors as "guide[s]" or "considerations [to be] weighed") and *Metropolitan Life*, 471 U.S. at 743 ("three criteria *relevant to* determining whether a particular practice falls within * * * the 'business of insurance'") (emphasis added). Indeed, in *FMC Corp.* v. *Holliday*, 498 U.S. 52, 61 (1990), the Court found a state anti-subrogation provision to be an insurance law without any reference to the *Pireno* factors.

The Court's analysis in *Pilot Life* also indicates that the insurance savings clause calls for a more flexible approach. After determining that the state law in that case met neither a "common-sense" understanding of insurance nor the first McCarran-Ferguson factor, because it did not spread risk, 481 U.S. at 50, the Court proceeded to address the other two factors as well. *Id.* at 50-51. That additional analysis would not have been necessary if petitioner were correct that a regulation must qualify under all three prongs.

Furthermore, the textual differences between the McCarran-Ferguson Act and the ERISA insurance savings clause suggest a somewhat broader scope for the latter. The ERISA insurance savings clause saves any law that "regulates insurance," 29 U.S.C. 1144(b)(2)(A)—a somewhat broader formulation than the McCarran-Ferguson Act's

reference to laws "enacted * * * for the purpose of regulating the business of insurance." 15 U.S.C. 1012(b). Consequently, the stricter approach that may be appropriate in McCarran-Ferguson Act cases to distinguish between the "business of insurance," which displaces federal antitrust and securities laws, and the "business of insurance companies," which may be subject to those laws, see *SEC* v. *National Sec., Inc.*, 393 U.S. 453, 459 (1969), would not have controlling significance in the ERISA context.

Finally, the differing legal contexts in which the McCarran-Ferguson Act and the ERISA insurance savings clause operate suggest that, even if a somewhat stricter application of the McCarran-Ferguson criteria were appropriate elsewhere, a more flexible approach should be applied in the ERISA context. The McCarran-Ferguson Act was primarily directed toward drawing a line between a well-developed federal regulatory regime under the federal antitrust laws and the equally well-developed state regulation of insurance; accordingly, a conclusion that the McCarran-Ferguson Act does not apply does not prohibit all regulation, but merely has the effect of subjecting an insurer to the federal regime. By contrast, a conclusion that a state law is not a law that "regulates insurance" under the ERISA insurance savings clause frequently has the opposite effect: it displaces a settled state scheme that has been found necessary to protect consumers and beneficiaries of insurance policies, without subjecting insurers to any corresponding scheme of substantive regulation under federal law. The Congress that enacted ERISA was deeply concerned with the basic goal of protecting the rights of plan participants and beneficiaries. A too-rigid application of principles drawn from McCarran-Ferguson Act cases in the context of the ERISA insurance savings clause could easily result in depriving ERISA participants and beneficiaries—whom Congress sought to protect—of needed consumer protections without providing any alternative.

C. The Notice-Prejudice Rule Does Not Conflict With ERISA'S Civil Enforcement Provisions

Petitioner contends that, even if the notice-prejudice rule would be saved under the insurance savings clause, it is nonetheless preempted because it conflicts with a substantive provision of ERISA and with the written terms of the ERISA plan in this case. Petitioner relies on *Pilot Life*, which it reads as having held that "ERISA would bar these [state] causes of action [for improper claims processing and failure to pay benefits]—even if the 'saving' clause were applicable—because they conflict with one of ERISA's substantive provisions, its exclusive civil enforcement scheme in [Section] 502(a)." Pet. 23, citing *Pilot Life*, 481 U.S. at 51-57. Petitioner is wrong, however, in its basic premise.

1. Petitioner's premise that a claim that conflicts with the written terms of a plan could not be a claim for benefits under Section 502(a) of ERISA, 29 U.S.C. 1132(a)—and therefore must be a state cause of action for improper claims processing or failure to pay benefits—is mistaken. In this case, the notice-prejudice rule is relevant not because it creates a separate state cause of action, but because it supplies a legal rule of decision to be applied in an ordinary action under Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B), "to recover benefits due * * * under the terms of the plan." In this respect, this case is analogous to *Metropolitan Life*, which held a state substantive law mandating certain insurance benefits to be saved. It is also analogous to *FMC Corp.*, in which the Court concluded that a state anti-subrogation rule would be saved, notwithstanding that the state rule affected the plan's payment of benefits. Analytically, there is no reasonable distinction to be made among a state mandatory-insurance-benefit law, an anti-subrogation rule, and a notice-prejudice requirement. Each kind of mandate must be viewed, as a matter of state insurance law, as incorporated into the terms of the insurance purchased by

plans in that State; none of these state mandates "conflict[s] with a substantive provision of ERISA." *Pilot Life*, 481 U.S. at 57 (referring to *Metropolitan Life*); cf. *John Hancock*, 510 U.S. at 99 n.9 ("[n]o decision of this Court has applied the saving clause to supersede a provision of ERISA itself").

In short, as the Court concluded in *FMC Corp.*, 498 U.S. at 64, "if a plan is insured, a State may regulate it indirectly through regulation of its insurer and its insurer's insurance contracts." Petitioner's argument to the contrary would virtually "read[] the saving clause out of ERISA entirely," *Metropolitan Life*, 471 U.S. at 741, since even the mandated benefits law at issue in *Metropolitan Life* would not be saved under such analysis.[9]

2. For the reasons stated in point 1, petitioner's contention that applying the notice-prejudice rule would conflict with Section 502 of ERISA should be rejected on the ground that this is an action for benefits under Section 502; applying the notice-prejudice rule as a rule of decision on the merits in a suit under Section 502 therefore in no way conflicts with any intent by Congress to make Section 502 the exclusive source of a cause of action. Petitioner's contention may be

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[9] Contrary to petitioner's contention (Pet. 25), the notice-prejudice rule does not conflict with the requirement in Section 503 of ERISA, 29 U.S.C. 1133, that plans must provide notice and the opportunity for review of denied claims, 29 U.S.C. 1133, or with the Secretary's regulation providing that "[a] claim is filed when the requirements of a reasonable claim filing procedure * * * have been met," 29 C.F.R. 2560.503-1(c) and (d). Rather, the notice-prejudice rule complements ERISA and the Secretary's regulation by providing a longer time to file a claim in the context of insured plans, if the insurer will not suffer prejudice thereby. Nor is petitioner correct in asserting (Pet. 25) that application of the notice-prejudice rule, contrary to a plan's express terms, conflicts with the statutory requirements that fiduciaries follow the written terms of the plan and pay benefits in accordance with those terms. 29 U.S.C. 1104(a)(1)(D), 1132(a)(1)(B). Those provisions could not reasonably be read to require fiduciaries to follow a plan's terms in contravention of applicable federal or state law.

rejected on that ground alone. If the Court does so, there will be no occasion for it to revisit the difficult issue of whether ERISA preempts a state law cause of action or remedy independent of Section 502, even where the state law in question "regulates insurance" within the meaning of the insurance savings provision. Resolving the interaction between Congress's intent to make Section 502 an exclusive remedy for claims under ERISA and its simultaneous intent to save state laws that "regulate[] insurance" would present the Court with the question whether it should reconsider part of the rationale of its decision in *Pilot Life* v. *Dedeaux*. As we explain below, there may be substantial reasons for the Court to do so, but there is no occasion for the Court to address that issue in this case.

We recognize that *Pilot Life* has been read to preclude even state law causes of action arising under laws that "regulate[] insurance."[10] That portion of *Pilot Life*'s rationale is, however, in significant tension with the text of the insurance savings provision and was unnecessary to *Pilot Life*'s holding that the law at issue there was not in any event an insurance regulation within the meaning of that provision.[11]

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[10] Most lower courts to have confronted the issue have concluded, like petitioner here, that *Pilot Life* requires the preemption of claims for benefits or remedies under state-law provisions that otherwise clearly constitute insurance law. See *Kanne* v. *Connecticut Gen. Life Ins. Co.*, 867 F.2d 489, 493-494 (9th Cir. 1988), cert. denied, 492 U.S. 906 (1989); *In re Life Ins. Co. of N. Am.*, 857 F.2d 1190, 1194-1195 (8th Cir. 1988) (citing district court cases); but see *Franklin H. Williams Ins. Trust* v. *Travelers Ins. Co.*, 50 F.3d 144, 151 (2d Cir. 1995).

[11] A number of bills were introduced in the Second Session of the 105th Congress that would have altered ERISA's preemption provisions to permit additional actions or remedies by participants and beneficiaries in health care plans. See, *e.g.*, H.R. 3605, S. 1890, S. 1891, S. 2330, S. 2416 (1998).

In *Pilot Life*, the Court considered whether ERISA preempted state common law tort and contract causes of action for bad faith processing of a claim for benefits by an insurer. Analyzing the state common law creating the cause of action at issue, the court initially concluded that (a) under a "common sense" view, the cause of action was rooted in general principles of Mississippi tort and contract law and was not "specifically directed toward th[e insurance] industry," 481 U.S. at 50; and (b) it "at most meets one of the three criteria used to identify the 'business of insurance' under the McCarran-Ferguson Act," *id.* at 51. Those holdings were sound, and they provided ample basis to conclude that the state law did not come within the ERISA insurance savings clause. The Court's holding in *Pilot Life* that the state law was preempted was therefore correct.

In a succeeding portion of the *Pilot Life* opinion, however, the Court—consistent with the position of the Solicitor General in a brief filed at the petition stage of the case (see 481 U.S. at 52; see note 14, *infra*)—went on to consider whether its conclusion that the state law was preempted was supported by the express provision in ERISA of a cause of action by a participant or beneficiary for plan benefits under Section 502(a)(1)(B), on the theory that that cause of action is exclusive of any others, such as a cause of action arising under state law. The Court concluded that it was, see 481 U.S. at 52-57, stating that "[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." 481 U.S. at 54. In that portion of its opinion, the Court did not advert to the text of the insurance savings clause. Instead, it relied heavily on Congress's intent with respect to Section 502, evident from the legislative history of ERISA, to federalize ERISA remedies in the same way that Section 301(a) of the Labor Management Relations Act

(LMRA), 29 U.S.C. 185(a), had federalized remedies for violations of collective bargaining agreements. See 481 U.S. at 54-56.

We do not question that reasoning in *Pilot Life* as a general matter. Unquestionably, "Congress intended § 502(a) to be the exclusive remedy *for rights guaranteed under ERISA*." *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 144 (1990) (emphasis added); *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 253-254 (1993) (because of comprehensive enforcement scheme, Court will not infer additional *federal* causes of action). And it is certainly true that, outside the context of state laws that "regulate insurance" within the meaning of the ERISA insurance savings clause, that exclusivity of the Section 502 civil enforcement provisions also appropriately informs the Court's understanding of the scope of ERISA preemption where a plaintiff brings a cause of action under state law that "relates to" an ERISA plan. See, *e.g.*, *Ingersoll-Rand*, 498 U.S. at 142. Congress, in short, clearly intended the remedial provisions of ERISA to be exclusive of any generally applicable state-law remedies related to ERISA plans. H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 327 (1974); see also *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 62-64, 66 (1987); *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 24 (1983).

It does not follow, however, that ERISA Section 502 should inform the preemption inquiry to the same extent with respect to a state-law cause of action or remedy that specifically "regulates insurance" as it does with respect to one of general applicability. In that situation, Congress has saved state substantive law, and it is not clear why Congress would have wanted to foreclose all access to state-created remedies or sanctions to enforce that substantive law, see, *e.g.*, *Metropolitan Life*, 471 U.S. at 734 (suit by state Attorney General against insurer of ERISA plans to enforce provision of state insurance law), especially where the causes

of action provided under Section 502 itself are not suited to that purpose.[12]

The savings clause states that "*nothing in this subchapter* shall be *construed* to exempt or relieve any person from any law of any State which regulates insurance." 29 U.S.C. 1144(b)(2)(A) (emphasis added). "[T]his subchapter" includes Section 502, which has been construed to provide exclusive remedies under ERISA, as well as the preemption provision itself, Section 514(a). Accordingly, the savings clause by its terms directs that nothing in Section 502, which concerns causes of action and remedies under ERISA, shall be "construed" to relieve or exempt any person from "any law" of a State that regulates insurance. Thus, the insurance savings clause, on its face, saves state law conferring causes of action or affecting remedies that regulate insurance, just as it does state mandated-benefits laws and other prescriptive measures that do so.

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[12] During the congressional debate on ERISA, substantive and enforcement provisions of law were linked by Senator Williams with reference to both the rule of preemption and its exceptions. Senator Williams observed that "with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations." 120 Cong. Rec. 29,933 (1974), quoted in *Shaw*, 463 U.S. at 99. To the extent ERISA preempts the field for federal regulation, see *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N.A.*, 519 U.S. 316, 335-336 (1997) (Scalia, J., concurring), it follows that both state substantive law and the measures to enforce that state law are preempted. But where ERISA does *not* preempt the field—here, because the insurance "exception" in Section 514(b) applies—there is force to the corresponding proposition that both state substantive insurance law and at least some enforcement measures necessary to make that substantive law effective are saved. Surely, for example, ERISA's saving of "any generally applicable criminal law of a State," 29 U.S.C. 1144(b)(4), authorizes the State to bring a criminal prosecution, not merely to have its substantive law applied in a suit brought under ERISA.

This Court gave effect to the facially unrestricted scope of the insurance savings clause in *Metropolitan Life*, when it "declin[ed] to impose any limitation on the saving clause beyond those Congress imposed in the clause itself and in the 'deemer clause' which modifies it," and concluded that "[i]f a state law 'regulates insurance,' as mandated-benefit laws do, it is not preempted." 471 U.S. at 746; cf. *Pilot Life*, 481 U.S. at 56-57 (*Metropolitan Life* clearly "rejected an interpretation of the [insurance] saving clause * * * that saved from preemption 'only state regulations unrelated to the substantive provisions of ERISA'").[13] In addition, the force of the savings provision's express terms is reinforced by the Court's frequent recognition—particularly in recent cases—that ERISA's preemption provisions must be read against the background of the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Travelers*, 514 U.S. at 655; see also *De Buono* v. *NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813 n.8 (1997); *California Div. of Labor Standards Enforcement* v. *Dillingham Construction, N.A.*, 519 U.S. 316, 325 (1997).

[13] Of course, notwithstanding the savings clause, an insurance law that conflicts with a provision of ERISA itself is preempted by virtue of the Supremacy Clause. See *John Hancock*, 510 U.S. at 99-100. Although the insurance savings clause "leaves room for complementary or dual federal and state regulation," ERISA "calls for federal supremacy when the two regimes cannot be harmonized or accommodated." *Id.* at 98. "[I]n the case of a direct conflict, federal supremacy principles require that state law yield." *Id.* at 100. Such conflict preemption occurs "where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." See *Boggs* v. *Boggs*, 520 U.S. 833, 834 (1997), citing *Gade* v. *National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992). There is no indication, for example, that Congress believed that judicial enforcement of state insurance law by a participant or beneficiary would in all circumstances conflict with the purposes of the provision in Section 502(a)(1)(B) for a participant to bring an action for benefits under the plan itself.

Furthermore, insofar as the significance of Section 502 for the preemption inquiry derives from Congress's intent to pattern suits under Section 502 on suits under Section 301 of the LMRA, that intent does not bear directly on the preemption of a state-law cause of action or remedy that "regulates insurance." That is because LMRA Section 301 does not contain any statutory exception analogous to ERISA's insurance savings provision. While Section 301 is no doubt highly instructive in cases in which the scope of ERISA's broad "relates to" preemption provision is at issue, Congress's enactment of the insurance savings provision suggests that it did not intend that parallel to be controlling where the state law, while within the scope of the preemption provision, *also* falls within the terms of insurance savings clause. Thus, the general background of Section 502(a) discussed in *Pilot Life* does not in itself require that a state law that "regulates insurance," and so comes within the terms of the savings clause, is nevertheless preempted if it provides a state- law cause of action or remedy.[14]

[14] In a brief filed in response to the Court's invitation at the petition stage in *Pilot Life*, we argued "that since Congress intended the procedures it established in Section 502 to be the exclusive procedures for enforcing claims for benefits due under employee benefit plans, the states are barred from establishing alternative procedures." Brief for the United States as Amicus Curiae at 19, *Pilot Life Ins. Co.* v. *Dedeaux*, No. 85-1043. We adhere to that conclusion in circumstances like those that were before the Court in *Pilot Life*, where a beneficiary invoked a general "state common law cause of action," *ibid.*, to obtain benefits under a plan, as well as other remedies. For the reasons given in the text, however, the exclusive nature of Section 502 may come into conflict with, rather than reinforce, the terms of the insurance savings clause where the participant or beneficiary (like the State Attorney General in *Metropolitan Life*, see 471 U.S. at 734) invokes a cause of action under state law that "regulates insurance"—*e.g.*, to enforce a specific provision of state insurance law that could not be enforced in a suit under Section 502. Insofar as our discussion

II. THE *ELFSTROM* RULE DOES "RELATE TO" ERISA PLANS WHEN IT IS APPLIED TO THEM, AND IT IS THEREFORE PREEMPTED

The court of appeals erred in concluding that the *Elfstrom* rule, as a general principle of state agency law, does not unduly interfere with plan administration and thus does not "relate to" an employee benefit plan in this instance. To the contrary, the *Elfstrom* rule "relate[s] to" plans within the meaning of Section 514(a), because, when applied in the context of deciding a claim for benefits under ERISA, it could directly interfere with the goal of national uniformity in plan administration.[15]

The *Elfstrom* rule, which pre-dates ERISA and which provides that "the employer is the agent of the insurer in performing the duties of administering group insurance policies," *Elfstrom* v. *New York Life Ins. Co.*, 432 P.2d 731, 737 (Cal. 1967), may not explicitly refer to or be dependent on the existence of an ERISA plan. See *Ingersoll-Rand*, 498 U.S. at 139. But the application of the *Elfstrom* rule to claims for benefits—like those advanced by respondent in

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in the text departs from the views we expressed at the certiorari stage in *Pilot Life*, it is worth noting that our submissions concerning ERISA preemption —like the Court's analyses—have been refined in light of the benefit of significant experience with ERISA preemption in the intervening 12 years. Specifically, it is now clear that preemption analysis must begin with the presumption that Congress did not intend to preempt state law, particularly in "fields of traditional state regulation." *Travelers*, 514 U.S. at 654-655. That presumption is particularly strong in the area of state insurance regulation, whose continued validity and application to ERISA plans Congress expressly provided for.

[15] In the same way, the notice-prejudice rule also "relate[s] to" the plan. Unlike the *Elfstrom* rule, however, notice-prejudice is a law regulating insurance that is saved from preemption, and any "disuniformities" that result from the application of the notice-prejudice rule "are the inevitable result of the congressional decision to 'save' local insurance regulation." *Metropolitan Life*, 471 U.S. at 747.

this case—does have a direct effect on plan administration. In effect, it forces the employer, as plan administrator, to assume a role, with attendant legal duties and consequences, that it has not undertaken voluntarily. Compare *De Buono*, 520 U.S. at 815-816 (economic impact alone insufficient to "relate to" plan); *Travelers*, 514 U.S. at 662, 668 (same). That is especially troubling because, as petitioner points out (Pet. 28), state agency law varies from state to state, and it could easily be the case that one multi-state plan would be subject to contradictory agency principles depending on what state law is applied. See, *e.g.*, *First Nat'l Bank* v. *Nationwide Ins. Co.*, 278 S.E.2d 507, 514-515 (N.C. 1981) (North Carolina law "establishes that the employer-master policyholder is not ordinarily the agent of the insurer"). Moreover, unlike a garnishment law like that at issue in *Mackey* v. *Lanier Collection Agency & Service*, 486 U.S. 825, 831-832 (1988), the effect on administration is not only substantial, but central and pervasive; it affects not merely the plan's bookkeeping obligations regarding to whom benefits checks must be sent, but also regulates the basic services that a plan may or must provide to its participants and beneficiaries. Accordingly, application of the *Elfstrom* rule to claims for benefits like that of respondent is contrary to ERISA's goal of uniform federal administration of employee benefit plans and thereby "relates to" ERISA plans.[16]

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[16] Although the issue apparently was presented to the district court, see Pet. App. 30a-31a, no party appears to be contending that the *Elfstrom* rule, although formulated in the context of insurance, is a state law that "regulates insurance" for purposes of the ERISA insurance savings clause. In our view, the *Elfstrom* rule is not a law that "regulates insurance," both because it is not specifically directed at insurance and for the additional reasons discussed by the district court, see Pet. App. 31a. The court of appeals described as "sound" and "comport[ing] with [the Ninth Circuit's] prior determination of the same issue" a formulation that makes quite clear that the rule is not law directed specifically at insurers, but is instead an application of general principles of agency law: "as the em-

Although we believe that the state-law *Elfstrom* rule is preempted, we are not suggesting that general agency principles, or indeed contract or trust principles, have no place in deciding an ERISA benefits claim. In this respect, the analogy to LMRA Section 301 is instructive. As in cases under that Act and in the absence of pertinent regulations issued by the Department of Labor, see 29 U.S.C. 1133, the federal courts are required to develop a uniform "federal common law of rights and obligations," *Pilot Life*, 481 U.S. at 56, concerning the circumstances under which ERISA plans will be held to have acted as agents of insurance companies. See, *e.g.*, *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 210 (1985)("[A] suit * * * alleging a violation of a provision of a labor contract must be brought under § 301 and be resolved by reference to federal law."). In developing that federal common law, the courts certainly can look to state-law principles. *Lyman Lumber Co.* v. *Hill*, 877 F.2d 692, 693 (8th Cir. 1989). But, by subjecting plans to a federal common law standard, the statutory goal of consistent application in a multi-state setting can be achieved. See *Shaw*, 463 U.S. at 105. Given their roots in general principles of agency law, rules similar to the *Elfstrom* rule appear to be widespread in state law. See Pet. App. 12a (citing cases). Thus, on remand the courts below should consider whether the *Elfstrom* rule, or something like it, applies to the circumstances of this case as a matter of federal, not California, common law.[17]

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ployer assumes responsibility for more administrative or sales functions which are customarily performed by an insurer, a question of fact will arise as to the agency relationship between the insurer and the employer." Pet. App. 13a n.6 (quoting *Paulson* v. *Western Life Ins. Co.*, 636 P.2d, 935, 939 (Or. 1981)). Cf. Pet. App. 24a (noting that "[t]he question ultimately for the district court under *Elfstrom* becomes whether MAC acted for UNUM and under UNUM's control in receiving and forwarding long-term disability claims").

[17] See, *e.g.*, *Security Life Ins. Co. of Am.* v. *Meyling*, 146 F.3d 1184, 1191 (9th Cir. 1998) (holding that rescission is an available remedy under the federal common law of ERISA); *McClure* v. *Life Ins. Co. of N. Am.*, 84 F.3d 1129, 1135 (9th Cir. 1996) (adopting "reasonable expectations" doctrine as a matter of federal common law to aid in interpretation of ERISA insurance policies); *City of Hope Nat'l Med. Ctr.* v. *HealthPlus, Inc.*, 156 F.3d 223, 228-229 (1st Cir. 1998) (applying federal common law principles of assignment in context of ERISA claim); *Ford* v. *Uniroyal Pension Plan*, 154 F.3d 613, 619 (6th Cir. 1998) (refusing to apply state law when calculating prejudgment interest award in context of successful ERISA benefits claim, but instead applying federal common law principles); *Moriarty* v. *Glueckert Funeral Home, Ltd.*, 155 F.3d 859, 865-867 (7th Cir. 1998) (in case arising under ERISA and LMRA, court applied federal common law of agency in determining whether member of multi-employer association was bound by particular provision of collective bargaining agreement concerning contributions to employee benefit plan).

CONCLUSION

The judgment of the Ninth Circuit with respect to the applicability of California's notice-prejudice rule should be affirmed. The court's judgment with respect to the applicability of the *Elfstrom* rule, however, should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

EDWIN S. KNEEDLER
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

JUDITH E. KRAMER
Deputy Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Deputy Associate Solicitor

ELIZABETH HOPKINS
Attorney
Department of Labor

NOVEMBER 1998